No. 78-1152

In the Supreme Court of the United States

OCTOBER TERM, 1978

RONALD VERGARA, ET AL., PETITIONERS

v.

CHAIRMAN, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

RONALD R. GLANCZ
ALLEN GERSON
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Page

Cases—Continued:

Constitution, statutes and regulation:

Page

Constitution, statutes and regulations-Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1152

RONALD VERGARA, ET AL., PETITIONERS

v.

CHAIRMAN, OFFICE OF PERSONNEL MANAGEMENT,* ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 581 F. 2d 1281. The opinion of the district court (Pet. App. 13-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1978. A petition for rehearing was denied on October 27, 1978 (Pet. App. 22). The petition for a writ of certiorari was filed on January 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

*The duties of the Civil Service Commission that are relevant to this case have been assigned to the Office of Personnel Management by Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037.

QUESTIONS PRESENTED

1. Whether Article II of the Constitution and the Civil Service Act empower the President to establish citizenship as a qualification for employment in the federal civil service.

2. Whether the Due Process Clause of the Constitution prohibits the establishment by the President of citizenship as a qualification for employment in the federal civil service.

STATEMENT

Petitioner Vergara, a citizen and national of the Phillipines, has since 1972 resided in the United States as a permanent resident alien. On August 27, 1973, petitioner applied for a position with the Internal Revenue Service but was denied consideration because a regulation of the United States Civil Service Commission, 5 C.F.R. 338.101, required citizenship as a condition for employment in the federal civil service. Petitioner thereafter instituted this suit, styled as a class action, challenging the validity of 5 C.F.R. 338.101.

The district court dismissed petitioner's complaint and upheld the constitutional validity of the Civil Service regulation. While the case was pending before the court of appeals, this Court decided *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), invalidating 5 C.F.R. 338.101. The Court ruled that, since the Civil Service Commission's mandate was limited to consideration of policies related to the efficiency of the Civil Service, the blanket exclusion of aliens from the civil service was unjustifiable. 426 U.S. at 115, 116. The Court expressly stated, however, that it assumed, without deciding, that "if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." *Id.* at 105.

In light of this Court's decision in *Mow Sun Wong*, the court of appeals vacated the district court's decision and, on July 14, 1976, remanded the case to the district court. Before any further proceedings were had, President Ford, on September 2, 1976, issued Executive Order No. 11935, 41 Fed. Reg. 37301, imposing a citizenship requirement for most positions in the competitive civil service (Pet. 3).[1]

The district court carefully examined petitioner's challenges to the presidential authority to issue the order and to the constitutional validity thereof.[2] Finding no impediment, the court granted summary judgment for respondents (Pet. App. 13-21). The court of appeals affirmed (Pet. App. 1-12). It read this Court's opinion in *Mow Sun Wong* as indicating that Executive Order No.

---

[1]Executive Order No. 11935, 41 Fed. Reg. 37301 (1976), provides as follows:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including Sections 3301 and 3302 of Title 5 of the United States Code, and as President of the United States of America, Civil Service Rule VII (5 CFR Part 7) is hereby amended by adding thereto the following new section:
>
> "Section 7.4 *Citizenship.*
>
> "(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
>
> "(b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.
>
> "(c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments."

[2]On December 30, 1976, petitioner Vergara obtained leave from the district court to file a second amended complaint. Joined in that complaint as co-plaintiffs were petitioners Esther Renteria and Jaime Alatorre. Petitioners Renteria and Alatorre have since become United States citizens (Pet. 7 n.3).

11935 would be valid (Pet. App. 11-12), and, at all events, concluded "that the national interests asserted by the government to support the executive order, which the Supreme Court said in *Mow Sun Wong* might be sufficient, are sufficient" (*id.* at 12).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court.

1. Petitioners concede that there is no conflict among the appellate courts. In *Jalil* v. *Campbell*, No. 77-1568 (D.C. Cir. Oct. 5, 1978), the only other appellate decision on the issue presented by petitioners' petition,[4] the District of Columbia Circuit held the Executive Order to be constitutionally valid.[5] Nor is there a conflict among the district courts that have been confonted with this issue.[6]

---

[3]The court of appeals reversed the district court's holding that petitioners were not entitled to a class determination on behalf of "all other nationals and citizens of foreign states living in Illinois who have been admitted into Illinois for permanent residence and who desire to apply and be eligible for appointment in the United States Civil Service" (Pet. App. 4-6).

[4]*Mow Sun Wong* v. *Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977), in which the district court sustained the constitutionality of the Executive Order following the remand from this Court, is pending before the Ninth Circuit.

[5]"The Court [in *Mow Sun Wong*] did not hold that it was unconstitutional *per se* to exclude aliens from the civil service positions, but merly that the Commission did not have authority to do so. We may presume from the Court's opinion that the President had this authority." *Jalil* v. *Campbell*, *supra*, slip op. 4.

[6]Upon remand, the district court in *Mow Sun Wong* v. *Hampton*, *supra*, decided (1) that this Court had dispositively determined that Executive Order No. 11935 did not exceed the scope of the President's statutory and constitutional authority to prescribe qualifications for federal employment (435 F. Supp. at 41-42), and (2) that the Order was not repugnant to the Due Process Clause of the Constitution (*id.* at 45-46).

In *Ramos* v. *U.S. Civil Service Commission*, 430 F. Supp. 422 (D. P.R. 1977), on a remand for reconsideration in light of *Mow Sun Wong* (see 426 U.S. 916 (1976)), the district court concluded that the "Executive Order * * * can be said to have breathed new life into the invalid regulation, or at least into the policies for which it stood, and under the language of *Mow Sun Wong* cited above [426 U.S. at 103], the President's Executive Order is both constitutional and entitled to legal effect." *Id. at* 424.

Petitioners nevertheless assert that certiorari should be granted "[g]iven the Court's acknowledgment in its *Mow Sun Wong* decision of the important questions raised by the total exclusion of aliens from the federal civil service and given the significance of the serious statutory and constitutional issues presented herein" (Pet. 10-11).

However, although this Court in *Mow Sun Wong* did not expressly decide whether exclusion of aliens from the federal civil service through an exercise of Presidential power, as opposed to regulation by the Civil Service Commission, is in conformity with the Due Process Clause of the Constitution (426 U.S. at 114), this Court did (1) fully dispose of petitioner's threshold contention that the President lacked constitutional and statutory authority to promulgate Executive Order No. 11935; and (2) set forth guidelines that effectively negate petitioners' contention that the Executive Order violates constitutional due process requirements.

2. Petitioners' challenge (Pet. 11-16) to the authority of the President to exclude aliens from the federal civil service, without the explicit assent of Congress, is without merit. The President's power to restrict civil service

positions to citizens was repeatedly assumed by the opinion of the Court in *Hampton* v. *Mow Sun Wong*.[7]

Article II of the Constitution vests in the President the "executive Power" of the Government (Section 1) and imposes upon him the duty to "take Care that the Laws be faithfully executed" (Section 3). These express constitutional provisions not only give the President ample authority to establish the machinery of the Executive Branch of the government, but, as a necessary incident, they also authorize him to set standards and

[7]See 426 U.S. at 103: "[I]f the rule were expressly mandated by the Congress *or* the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption;" 426 U.S. at 105: "We may assume with the petitioners that if the Congress *or* the President had expressly imposed the citizenship requirement, it would be justified by the national interest * * * [asserted by the Government];" 426 U.S. at 105: "In order to decide whether such acquiescence [by the Congress and the President] should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress *or* the President;" 426 U.S. at 110: "[T]here is a marked difference between acceptance by the President of a Commission rule to which no objection has been made and a decision made by the President himself;" 426 U.S. at 113 n.46: "[I]n view of the consequences of the rule it would be appropriate to require a much more explicit directive from either Congress *or* the President before accepting the conclusion that the political branches of government would consciously adopt a policy * * * [excluding aliens from the civil service];" 426 U.S. at 114: "[A]ssuming, without deciding, that the Congress and the President have the constitutional power to impose the requirement that the Commission has adopted;" 426 U.S. at 116: "[A]ssuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress *or* the President to exclude all non-citizens from the federal service" (emphasis added throughout).

qualifications for those who are appointed to assist him in carrying out those powers. Except as the Constitution requires higher officers to be confirmed by the Senate or the Congress otherwise provides, the appointive power rests with the President (Art. II, Sec. 2, cl. 2). This plainly includes authority to determine qualifications. The only question is whether Congress has validly restricted the President's discretion or whether the eligibility criteria he has announced violate some other provision of the Constitution.

3. It is claimed that Executive Order No. 11935 is inconsistent with 5 U.S.C. 3301(1), a provision of the Civil Service Act. This argument is also without merit.

The cited provision requires regulations promulgated under the statute to be of a nature that "will best promote the efficiency" of the civil service. But the legislative history and subsequent congressional interpretation of that statute reveal that it was intended to empower the President to use any reasonable qualification—including citizenship—as a proper qualification for the establishment and maintenance of an efficient federal civil service. Continuously for over three decades, Congress has expressly ratified the federal government's policy of excluding aliens from the civil service.[8] In the Treasury, Postal Service, and General Government Appropriation Act, 1973—in effect when the original complaint in this case was filed—Congress mandated that as a general rule no appropriated funds should be used to pay compensation to aliens employed by the federal government whose post of duty is in the United States.[9]

[8]See Second Deficiency Appropriation Act, 1938, ch. 681, Section 206, 52 Stat. 1162; Treasury-Post Office Appropriation Act, 1939, ch. 55, Section 5, 52 Stat. 148.

[9]The Act, Pub. L. No. 92-351, 86 Stat. 471, 487, read in pertinent part as follows:

> Sec. 602. Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any

This congressionally-imposed ban has been enacted every year since.[10]

In *Mow Sun Wong* this Court took notice of congressional support for the past 40 years of the federal government's policy of exclusion of aliens from the civil service (426 U.S. at 105):

> [I]n view of the fact that the policy has been in effect since the Commission was created in 1883, it is fair to infer that both the Legislature and the Executive have been aware of the policy and have acquiesced in it. In order to decide whether such acquiescence should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission.

In sum, this Court presumed that 5 U.S.C. 3301(1) gave the President sufficient authority to promulgate an executive order barring aliens from the civil service.[11] The only matter that this Court found "appropriate to review" in *Mow Sun Wong* was "the nature of the authority specifically delegated [by the President or the Congress] to the Commission" (426 U.S. at 105).

4. Finally, petitioners assert (Pet. 16-23) that the decision below raises significant, recurring and unsettled questions concerning the Fifth Amendment rights of aliens. Petitioners aver that although the court of appeals identified certain national interests claimed to be served by the Order, it improperly "failed to disclose the standard by which it evaluated those interests and gave no consideration to whether these interests, even if sufficient in some circumstances, might have been adequately served by a less restrictive order distinguishing among the various categories of permanent resident aliens, and/or among different types of federal jobs" (Pet. 17). Petitioners cite (Pet. 17-19) this Court's decisions in *Foley* v. *Connelie*, 435 U.S. 291 (1978); *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572 (1976); and

---

other Act shall be used to pay the compensation of any officer or employee of the Government of the United States * * * whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence: * * * *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

[10]Treasury, Postal Service, and General Government Appropriation Act, 1974, Pub. L. No. 93-143, Section 602, 87 Stat. 524-525; Treasury, Postal Service, and General Government Appropriation Act, 1975, Pub. L. No. 93-381, Section 602, 88 Stat. 630-631; Department of Defense Appropriation Act, 1976, Pub. L. No. 94-212, Section 753, 90 Stat. 177; Department of Defense Appropriation Act, 1977, Pub. L. No. 94-419, Section 750, 90 Stat. 1299; Treasury, Postal Service, and General Government Appropriation Act, 1978, Pub. L. No. 95-81, Section 602, 91 Stat. 354-355.

[11]As the court of appeals aptly stated, "[i]f the Court had believed the statutory delegation to the President was insufficient to authorize the regulation, the case would presumably have been decided on that statutory ground, and the Court would not have reached the constitutional issue" (Pet. App. 7). In any event, as the court of appeals also points out, this Court in *Mow Sun Wong* stated that it had "no doubt" that the statute and the executive order gave the Commission discretion "either [to] retain or modify the citizenship requirement without further authorization from Congress or the President" (426 U.S. at 113). *A fortiori* the Executive Order challenged here is authorized.

Nyquist v. *Mauclet*, 432 U.S. 1 (1977), in support of the proposition that classifications based on alienage can pass constitutional muster only if they are based on categories of permanent aliens or types of federal jobs.

The flaw of the argument is that the cases cited involved state rather than federal classifications. While the Court has consistently ruled in recent years that classifications by a state that are based on alienage are "inherently suspect and subject to close judicial scrutiny," *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971),[12] the Court has with equal consistency held that, because of the federal government's plenary power and responsibility over aliens, the *Graham* approach does not apply to the federal government. Thus, in *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) (footnotes omitted), it was said:[13]

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. * * * The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

[12]See also *In re Griffiths*, 413 U.S. 717, 721 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973).

[13]See also *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8, a case principally relied on by petitioners, where the Court held that the appellant state officials "can draw no solace from * * * [*Mathews* v. *Diaz*] because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."

And in *Mow Sun Wong* this Court expressly held (426 U.S. at 100-101; footnotes omitted):

> In this case we deal with a federal rule having nationwide impact. The petitioners correctly point out that the paramount federal power over immigration and naturalization forecloses a simple extension of the holding in *Sugarman* as decisive of this case. We agree with the petitioners' position that overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State.

The court of appeals in this case applied the correct standard. It followed this Court's lead in finding sufficient the justifications mentioned in *Mow Sun Wong*, *supra*, 426 U.S. at 105: "the national interest in providing an incentive for aliens to become naturalized," and "providing the President with an expendable token for treaty negotiating purposes."[14]

At all events, the requirement of citizenship as a condition for civil service employment is rational, and in accord with the universal practice of nations.[15] National

[14]Petitioners contend (Pet. 20) that "as to those resident aliens who cannot yet become citizens, but who have formally declared their intent to do so, such 'encouragement' has no logical function." The short answer to this assertion is that the principal petitioner, Vergara, has never declared any intent to become an American citizen. In any event, it is not illogical to suppose that even for those aliens who have declared their intent to become American citizens the prospect of escape from classifications based on alienage may act as further encouragement not to waver in their intent to become naturalized citizens.

[15]A survey of the domestic laws of other countries reveals a nearly uniform tendency to limit employment in the public service to their citizens. See United Nations, Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* (1966). Only Ethiopia does not restrict civil

governments clearly have a legitimate reason to expect that members of their civil service have a knowledge and understanding of the nation's history and the principles and form of its government which aliens seeking naturalization are required to demonstrate as a condition of citizenship. 8 U.S.C. 1423(2).

Unlike such characteristics as sex, race or national origin, alienage is not an "immutable characteristic determined solely by the accident of birth." Cf. *Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973) (plurality opinion). Until an alien becomes eligible to apply for citizenship, his characteristic as an alien is dictated by the Constitution,[16] Acts of Congress,[17] and by international

---

service posts to its nationals. *Id.* at 329. Nor does international law admit of any right of aliens to civil service employment. As stated in A. Roth, *The Minimum Standard of International Law Applied to Aliens* 152 (1949) (footnote omitted):

> In accordance with this general rule, it is furthermore universally recognized that the State of residence may exclude aliens from all public employment, civil or military and from all functions which include a delegation of a part of public power.

[16]The Constitution grants numerous rights to citizens that are withheld from aliens. See *Sugarman* v. *Dougall, supra,* 413 U.S. at 651-652 (Rehnquist, J., dissenting). And, in general, "[u]nder our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 586 (1952) (footnotes omitted).

"Citizenship *is* man's basic right for it is nothing less than the right to have rights." *Perez* v. *Brownell,* 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting; emphasis in original). It, "alone, assures him the full enjoyment of the precious rights conferred by our Constitution." *Id.* at 78.

[17]The term "alien" is defined in the Immigration and Nationality Act of 1952 as "any person not a citizen or national of the United States." 8 U.S.C. 1101(a)(3). "[N]ational of the United States" means "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. 1101(a) (22).

law.[18] If an alien who has become eligible for naturalization chooses thereafter to prolong his ambiguous status in this country—as petitioner Vergara here has—he should not be heard to complain that he is being deprived of an eligibility which the government has chosen to reserve to citizens.

---

[18]Under international law, nationality involves a firm and permanent bond with a body politic. As was stated by the International Court of Justice in the *Nottebohm Case (Liechtenstein* v. *Guatemala),* [1955] I.C.J. Rep. 4, 23:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

Accordingly, since the President's citizenship requirement for civil service employment, far from being arbitrary or capricious, was justified by legitimate and universally recognized governmental interests, petitioners' substantive constitutional due process rights were not violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

RONALD R. GLANCZ
ALLEN GERSON
Attorneys

MARCH 1979

DOJ-1979-03